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LAWYERS AGAINST THE LAW? JUDGES AND THE LEGAL PROFESSION IN RHODESIA AND ZIMBABWE¹

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INTRODUCTION

The satirist Jonathan Swift in *Voyage to The Country of The Onyhnhnms* painted a wholly negative image of lawyers and courts of law by portraying them as:

... a society of men among us, bred up from their youth in the art of proving by words multiplied for the purposes that white is black, and black is white, according as they are paid. To this society all the rest of the people are slaves. For example, if my neighbour hath a mind to my cow, he hired a lawyer to prove that he ought to have my cow from me. I must then hire another to defend my right, it being against all rules of law that any man should be allowed to speak for himself. It is a maxim among these lawyers that whatever has been done before, may legally be done again; and therefore they take special care to record all the decisions made against common justice, and the general reason of mankind. These, under the name of precedents, they produce as authorities to justify the most iniquitous opinions, and the judges never fail directing accordingly. They have a court and a jargon of their own, that no other mortal can understand, and where in all their laws are written which they take special care to multiply; whereby they have compounded the very essence of truth and falsehood; of right and wrong; so that it will take thirty years to decide whether the field left me by my ancestors for six generations belongs to me or to a stranger three hundred miles off.²

This negative image of lawyers as a dishonest profession which feeds on the innocent's miseries is almost as old as the legal profession and has sometimes resulted in shortsighted, emotional and retrogressive measures against the legal profession such as its abolition in France soon after the 1789 Revolution and in Russia in the aftermath of the 1917 Socialist Revolution.³

In contrast to the above perceptions, lawyers often see themselves and their profession as custodians of every society's civilisation. For example, Justice Maugham has argued that "lawyers are the custodians of civilisations than which there can be no higher aim and nobler duty".⁴ In similar vein Karl Llewelyn has written in glowing terms of lawyers, their skills and their special role in society as follows:

The essence of our craftsmanship lies in skills and wisdom, in practical, effective, persuasive, inventive skills for getting things done, any kind of thing in any field; in wisdom and judgement in selecting the things to get done; in skills for moving men

1 An earlier and longer version of this paper, then entitled "The Courts of Law in Rhodesia and Zimbabwe: Guardians of Human Rights and Justice or Purveyors of Repression and Injustice?" was presented at the International Conference on Historical Dimensions of Democracy and Human Rights in Zimbabwe, held at the University of Zimbabwe, 9-14 September, 1996.

2 Quoted by Justice C. Waddington in *Court Representation*, 1982 Vol 22, 133. This negative image of lawyers is also reflected in Charles Dicken's Classic novel *Bleak House*.

3 See Summers, "Fuller on Legal Education" *Journal of Legal Education*, Vol 34, No. 1, 1984, 2.

4 *Ibid*, at p 8.

into desired action, any kind of man, in any field, and then skills for regulating the results, for building into controlled large scale action such doing of things and such moving of man. Our game is essentially the game of planning and organising management (not for running it), except that we concentrate in the areas of conflict, tension, friction, trouble, doubt — and in those areas we have the skills for working the results. We are the trouble shooters. We find the way out and set up the methods of the way, and get the men persuaded to accept it, and to pick up the operation. That is the essence of our craft.⁵

Whatever else the above contradictory images of law, lawyers and the courts may suggest, properly conceived law is not simply a discipline concerned with the content of rules and the techniques of litigation and argumentation, but is a facet of culture, politics, morals, and economics; a manifestation of power and authority and a device and instrument for channelling, regulating, restraining, legitimating, moderating and mediating. Law is one of the primary means of organising society. It is the medium for the recognition and enforcement of human rights and of restraining the state and other social organs from trespassing on the rights of citizens. It regulates, moderates and legitimises politics by defining in advance the rules for competition into political office. Lawyers, judges and the courts inevitably have to play key roles in this process.

However, law is also a double-edged sword with the inherent capacity to be used in ways inimical to human rights, justice and the public good. As an instrument of social regulation, with the capacity for both repression and liberation, law has historically conjured contradictory images. On the one hand it is associated with images of extensive repression and oppression such as under Nazi Germany; colonial rule in Africa characterised by racial subjugation and repression; the various one party dictatorships prevalent in Africa in the immediate post-independence period. Most of the repression referred to above was often carried out in the name of law and order. Even the most elaborate system of racial discrimination, oppression and repression, the world has ever seen — apartheid — was regulated by laws made by seemingly civilised men who professed belief in God and Christianity. Judges, Magistrates, prosecutors and other lawyers administered inherently unjust, discriminatory and repressive apartheid laws.

The law, lawyers, judges and the courts can and are often used not just for the distortion of justice but also to establish and maintain elaborate systems of legally sanctioned oppression and repression.

Law, lawyers and judges can play either a progressive or retrogressive role in any society. Free societies rely on law, lawyers and the courts to defend, assert, expand and institutionalise their rights and freedoms. Totalitarian regimes and dictatorships of various shades also rely on law, lawyers and the courts to deny rights, to entrench dictatorship and to legitimize undemocratic rule. Thus the law, lawyers and the courts may be used as instruments for the advancement of freedom, democracy and human rights and also may at the same time play exactly the opposite role. The great challenge which has faced and still faces many societies is how to channel law, lawyers and the courts into saving the interests of justice, human rights and democracy rather than end inimical freedom, justice and democracy.

Lawyers and the courts are not the sole custodians of human rights, justice and democracy, let alone civilisation. As Mr Justice Khanna has perceptively observed and warned:

5 Quoted by G. Moyo, "Legal Education, Lawyers and Development in Zimbabwe" 1996, LLB Dissertation.

There is no modern instance, . . . in which any judiciary has saved a whole people from the grave currents of intolerance, passion and tyranny which have threatened liberty and free institutions. The attitude of a society and of its organised political forces rather than of its legal machinery, is the controlling force in the character of free institutions. The ramparts of defence against tyranny are ultimately in the hearts of the people.⁶

This, however, does not mean the courts, lawyers and the legal profession in general have no role to play in the recognition, defence and expansion of human rights and democracy. On the contrary, they have a central, crucial and critical role. However, the ultimate guarantee of freedom has to be found in the people themselves. The judiciary and lawyers must play their role in the constellation of factors which determine the defence of liberty, freedom and democracy.

The object of this paper is mainly to assess the role played by lawyers and the courts in Rhodesia and in Zimbabwe from a historical perspective in advancing and/or retarding democratic ideals, human rights and liberty. In doing this the organisation, structure, and jurisdiction of the courts in the two periods are presented and analysed within the framework of the advancement and expansion of justice and human rights. The philosophical foundations of the jurisprudence of the Rhodesian and Zimbabwean courts are then presented and reviewed in the context of the plethora of repressive legislation which had/has to be applied and enforced under the auspices of the relevant constitutional orders.

CONTINUITIES BETWEEN THE RHODESIAN AND ZIMBABWEAN LEGAL SYSTEMS

The Rhodesian legal system was inherited by independent Zimbabwe virtually intact in terms of both the structure of the courts and the laws they applied. In this respect the continuities between Rhodesia and Zimbabwe are rather staggering. The Rhodesian courts simply became the Zimbabwean courts with some adjustments here and there. The courts applying criminal law and the general law have remained virtually intact, namely the magistrates' courts and the High Court as courts of first instance. Indeed, the Magistrates Court Act, Cap 18 (now Cap 7:10) enacted during the colonial period has not been repealed and replaced. It has only been subjected to minor amendments. However, the colonial High Court Act has been repealed and replaced, even though its substance remains unchanged. The Appellate Division of the High Court has been renamed the Supreme Court and expanded from three Judges of Appeal to five Judges of Appeal and the Supreme Court Act (Cap 7:13) enacted to regulate its powers in much the same way as was the case in Rhodesia.

Thus it can be stated that the Rhodesian Magistrates' Courts, High Court and Appellate Division (now restyled Supreme Court) have been retained in Zimbabwe lock stock and barrel in terms of their powers, personnel and organisation. Judges of the High Court and Supreme Court are still appointed by the executive after consultation with the Judicial Service Commission, a supposedly independent judicial organ whose advice is not binding on the executive. The only safeguard is that Parliament must be advised of an appointment of a judge which is inconsistent with the advice given by the Judicial Service Commission.⁷ The qualification for appointment is still substantially the same — experience as a lawyer

6 Quoted by D. Morgan "The Indian Essential Features' Case" 1981 *ICLQ* 335.

7 See Section 84 of the Constitution of Zimbabwe.

for several years (now fixed at seven years).⁸ Judges still enjoy the same security of tenure as they enjoyed in Rhodesia⁹ and they can still be removed from office only for inability to discharge the functions of their office or for misbehaviour as determined by an independent tribunal controlled by experienced lawyers.¹⁰ Unlike in Rhodesia the Zimbabwe Constitution expressly states that members of the judiciary shall be independent from external control in the exercise of their judicial functions. This provision was inserted into the Constitution in 1990 and was extended so as to apply to magistrates' courts.¹¹ As has already been seen, Rhodesian Magistrates' Courts were not guaranteed independence. However, magistrates are still civil servants in terms of their promotion, conditions of service, remuneration, discipline and dismissal. In this context nothing has changed. All that has really been provided is a constitutional statement that magistrates shall not be "subject to the direction or control of any person or authority" in the exercise of their judicial authority/functions. In practice, the same pressures in respect of promotion, discipline, dismissal, and salary increments, still exist.

The jurisdiction of the High Court has remained the same, so has that of the Supreme Court. The procedure providing for direct access to the Supreme Court in respect of allegations of violations of the Declaration of Rights provided for in the 1961 Rhodesian Constitution was imported into the Zimbabwean Constitution by section 24 of the latter Constitution.

Magistrates Courts still have concurrent jurisdiction over both customary and general law cases, except that the monetary limits have been increased to keep pace with inflation and also their sentencing powers have gone up.

It is in relation to the courts applying customary law that some substantial changes took place. Headmen and chiefs' courts together with District Commissioner's Courts were abolished in 1981 through the Customary Law and Primary Law Courts Act No. 6 of 1981 which introduced the primary courts presided over by presiding officers appointed by the Minister of Justice. Headmen, Chiefs and District Commissioners thus lost all their judicial powers which were given to primary courts made up of village courts at the lowest level and above them community courts.¹² Untrained presiding officers in practice elected at the village level and then formally appointed by the Minister of Justice presided over village courts which were courts of first instance in which lawyers were not permitted to appear.¹³ Community courts were presided over by partially trained presiding officers appointed by the Minister. The monetary jurisdiction of community courts was unlimited while that of village courts was limited to \$500.00.¹⁴ Appeals from community courts went to the magistrates' courts, styled District Courts for such purposes. Primary courts could only decide cases under customary law except where specifically empowered to apply the provisions of a statute.¹⁵

8 Section 82.

9 Section 86. Security of tenure means the office of judge may not be abolished during his tenure of office and that he shall retire at 65 years unless he elects to retire at seventy years and further that the salary of a judge shall be paid from the Consolidated Revenue Fund and cannot be reduced during his tenure of office.

10 Section 87.

11 See Sections 79A and 79B.

12 Section 7.

13 Section 8 (1).

14 Section 11(2).

15 Section 11 (1) (a) and 11 (2) (a).

In 1990 the primary courts were abolished through the Customary Law and Local Courts Act, 1990 which restored the civil judicial functions of headmen and chiefs. The Customary Law and Local Courts Act established primary courts presided over by headmen and new community courts presided over by chiefs.¹⁶ Collectively these two courts were styled local courts with the monetary jurisdiction of primary courts being limited to \$500.00 while that of community courts is limited to \$1 000.00.¹⁷ Lawyers are prohibited from appearing in local courts. Appeals lie to the magistrates' court where the system joins the general law system. Like Native Commissioner's Courts, in Rhodesia, Magistrates' Courts have been given extensive supervisory powers over local courts.¹⁸ It is obvious that this structure is strikingly similar to that established in Rhodesia by the Native Law and Courts Act, 1937. Also similar is the fact that local courts can only determine cases under customary law.¹⁹ In this context, it can be said the court system operative in Rhodesia, just before independence, save for District Commissioner's Courts, Tribal Courts and the Court of Appeal for African Civil cases has been completely re-established in Zimbabwe. Thus the continuities between Rhodesia and Zimbabwe in this respect are quite remarkable.

In terms of the law to be applied in Zimbabwe, independence did not bring much change either. The application of Roman-Dutch common law as the general law of Zimbabwe, was continued by section 89 of the Constitution. The Zimbabwean constitution, like its Rhodesian predecessors, also recognised customary law but did not make specific provisions for its application. This was done by the Customary Law and Primary Courts Act, which introduced substantial changes to the colonial choice of law rules — changes intended to rehabilitate customary law which had been largely ignored and despised in Rhodesia. The Customary Law and Primary Courts Act abolished the racial based choice of law criteria provided for in the African Law and Tribal Courts Act and in its place introduced a supposedly socially based choice of law criteria in terms of which customary law was to be applicable to Africans and non-Africans depending on the relative closeness of the parties, the cause of action, the subject matter of the dispute *e.t.c.* to customary law.

The significance of the new choice of law criteria is that it sought to reintegrate and re-establish customary law into the country's legal system whereas during the colonial period customary law had been marginalised, distorted, constructed and reconstructed by white judicial officers who had little understanding of it. These changes were aimed at arresting the judicial alienation of the African people from their customary law. It remains to be seen whether customary law will develop and be strengthened within the new order.

THE COURTS AND SUBSTANTIVE LAW IN RHODESIA AND ZIMBABWE

Proper and effective enforcement of human rights standards in any given country requires certain minimum prerequisites. Firstly, human rights must be clearly recognised and defined in the Constitution which must provide for only the minimum possible derogations. Secondly, the human rights so defined must be justiciable at all times, otherwise they would not be worth the paper they are written on. Thirdly, there must be established and developed an independent, impartial, well trained and experienced judiciary to interpret and enforce those rights. Once again without a properly trained, independent, intellectually sound,

16 Section 10 (1) and 11 (1) and 11 (2).

17 Sections 15 (1) (b) (i); 11 (2) and 15 (1) (b) (ii).

18 Section 24.

19 Section 15 (1) (a).

principled and fearless judiciary the constitutional protection of human rights becomes illusory. Fourthly, there must also be a well trained, principled, well-equipped and accessible legal profession fully committed to the rule of law and to the enforcement of human rights without fear or favour. A timid, intellectually weak and uncommitted legal profession is as dangerous to fundamental freedoms as dictators are. Fifthly, civil society must be vibrant, vigorous and cultured in human rights traditions and principles.

Put differently, a Bill of Rights is only as good and as valuable as the courts/judges who interpret and apply it; it is only as good as the legal profession that presents cases on it before the courts; it is only as good as the law schools which train members of the legal profession and which provide philosophical and jurisprudential analysis and critique of court judgements and processes of reasoning; it is only as good as the society which has to defend it both politically and judicially. In short, a Bill of Rights, indeed the whole national Constitution, requires continuous effective institutional, philosophical and cultural reinforcement which is only possible in a country with highly trained and experienced judges with very high ideals on human liberty, freedom, dignity and the rule of law, supported by an equally trained legal profession imbued with all the high ideals of independence, integrity and the rule of law.

One of the most terrible things that can happen and often happens with unbelievable frequency is the phenomenon of lawyers who turn against the law. Lawyers often betray the law and the ideals of the law and the rule of law, as judges, as legal practitioners, as politicians, as legal advisors, as prosecutors and as draughtsmen, by collaborating against human rights in the drafting of draconian anti-human rights statutes and by weakening the constitution through narrow, pedantic and unimaginative interpretations. One of the most ironic things is that there are always lawyers at the forefront of human rights violations and denials. I personally have always found it difficult to explain why this happens considering the values which law schools try to impart on justice, fairness, the rule of law, constitutionalism, democracy and human rights in general.

HUMAN RIGHTS AND ANTI-HUMAN RIGHTS LAWS IN RHODESIA

Before 1961 the various Rhodesian constitutions did not provide for a justiciable Bill of Rights. The 1961 Constitution became the first constitution of the country which provided for a justiciable Bill of Rights. However, this Bill of Rights was seriously hamstrung and handicapped from the beginning for a variety of reasons which made it largely a useless paper Bill of Rights.

Firstly, this Bill of Rights did not provide for the protection of some basic fundamental rights, which at that time were already standard rights in international human rights instruments and in other comparative national constitutions.²⁰ Secondly, the rights granted were subject to such comprehensive and broadly formulated exceptions that it would be accurate to define the Rhodesian Bill of Rights as having provided freedom with one hand and annihilated it with another.²¹ Thirdly, the constitution provided for the continuing validity of any law inconsistent with the Bill of Rights if such law was enacted prior to the coming into force of the Bill of Rights. Also validated were laws inconsistent with the Bill of Rights enacted after the coming into force of the Bill of Rights provided that such laws

20 An example of a fundamental right not protected at all was that of freedom of movement.

21 For a fuller discussion of some of the sweeping exceptions to the rights granted see Palley, *Constitutional History and Law of Southern Rhodesia 1888-1965*, Clarendon Press, 1996 at pp 575-628.

were re-enactments of pre-existing laws.²² This meant that the whole plethora of discriminatory, racist and repressive legislation was to remain in force. For Africans this was indeed a useless Bill of Rights. In practice, the saving provisions were relied upon and upheld by the courts as validating "re-enacted" legislation which would otherwise have contravened the Bill of Rights, even in cases where it seemed clear that the "re-enactments" went beyond the extent of the pre-existing enactments.²³ Fourthly, the Constitution allowed for a Declaration of a State of Emergency during which virtually every aspect of the Bill of Rights could be derogated from by Ministerial decree. A state of Emergency was declared in 1965 and continued in existence right up to 1990. Regulations made during the state of Emergency effectively suspended the Bill of Rights in many material respects.

Fifthly, the attitude of the racist governments to the Bill of Rights was simply so negative that it was bound, even within its narrow limits, to be routinely violated with impunity as the state assumed loosely defined discretionary powers. Sixthly, the situation was not helped by the fact that the legal profession, with very few exceptions, had been co-opted into the racist, undemocratic and dictatorial agenda of the government. Finally, even within its very narrow confines, the Rhodesian Bill of Rights could be nothing but a paper tiger because the courts effectively rendered it nugatory by their narrow conceptions of human rights and their interpretations thereto.

The Rhodesian courts did not have any traditions of upholding human rights. Most of their judgements relating to the Declaration of Rights indicated "a tendency to treat the Constitution as a statute to be interpreted according to ordinary canons [of interpretations]".²⁴ Furthermore, mainly because of their support for the policies of the racist governments of the day they established the principle of assuming the validity of challenged legislation in such a way that "every possible presumption . . . [was] made in favour of the validity of such a law".²⁵

The futility of the Rhodesia Bill of Rights was well summarised by the International Commission of Jurists as follows:

The Constitution of Southern Rhodesia is a striking example of the futility of laying down human rights in the constitution and thereafter subjecting those same human rights to the sway of a legislature which does not adequately represent the people of the country; an examination of Southern Rhodesia legislation in relation to the human rights proclaimed in the Constitution makes one wonder why the trouble was ever taken to put those human rights in the Constitution.²⁶

Appearances for the sake of appearances were abandoned in 1969 when the 1969 Rhodesia Republican Constitution made the Declaration of Rights non-justiciable allegedly on the ground that it could "involve the judiciary in political controversy".²⁷ This effectively put to an end any pretence that fundamental human rights were recognised and protected in

22 See Section 70 (1) (b) and (c).

23 See for example *African Newspapers (Pvt) Ltd and Wason v Lardner-Burke and Bosman NNO*, 1964 (4) SA 486. See also C. Palley *supra* at pp 571 and 577-578.

24 C. Palley, *supra* pp 571.

25 *Ibid.* See also *Maluleke v Minister of Law and Order Another*, 1963 (4) SA 206 SR and *Musarurwa v Attorney-General, Southern Rhodesia*, 1963 (4) SA 720.

26 Bulletin of the International Commission of Jurists, No. 18, March 1964. "Southern Rhodesia — Human Rights and the Constitution", at p. 44.

27 Quoted from the Whaley Commission Report by J. Hatchard, *Individual Freedoms and State Security in the African Context, The Case of Zimbabwe*, Baobab Books, Harare, 1993 at pp 12.

Rhodesia. The construction of a brutal, anti-human rights and repressive legal system which had started earlier was intensified. Legislation which effectively made Rhodesia a complete dictatorship amounting to state terrorism included the following:

- i The Vagrancy Act, Chapter 92 (now Cap 10:25) which empowered the police to arrest without warrant any person who could not show that he was employed or had adequate means of support. In practice thousands of Africans were arrested under this legislation and found no justice from the courts.
- ii The Law and Order Maintenance Act, Chapter 67 (now Cap 11:07) which gave the police sweeping powers including powers to enter and search private homes; to ban public meetings; to forbid any person from addressing any meeting; to disperse any public gathering and to stop and/or impose any conditions on the holding of public processions and demonstrations. The Minister of Internal Affairs was empowered to ban any publication which he believed to be contrary to the public interest. Heavy penalties were imposed for a variety of offences created by the Act, whose net effect was to criminalise ordinary political activity.²⁸ The Law and Order Maintenance Act was so draconian that the Federal Chief Justice, Sir Robert Tredgold, who resigned in protest at its enactment described it as "an anthology of horrors" and a "savage, evil, mean and dirty" law.²⁹ He further commented that:

It almost appeared as though someone had sat down with the Declaration of Human Rights and deliberately scrubbed out each in turn.

- iii The Unlawful Organisations Act, Chapter 91 (now Cap 11:13) which gave the President sweeping powers to declare any organisation including political parties to be unlawful if it appeared to him that the activities of such organisation endangered public order. The Act itself went on to declare as unlawful organisations, virtually all African nationalist political parties.
- iv The Emergency Powers Act, Cap 43 (now Cap 11:04) permitted the government to declare a state of emergency and thereafter make any regulations to deal with the emergency. Various regulations authorising indefinite detentions without trial were made³⁰ and used to detain without trial thousands of nationalist leaders and activists whose only crime was to oppose the government's racist policies. By and large the courts upheld all these detentions.

Those arrested as "ordinary criminals" and those detained as political prisoners were routinely tortured and the courts were often used to defend and to cover up this state brutality. That the Rhodesian judiciary was part and parcel of the state's systematic denials and violations of human rights is beyond dispute. I need do no more than give an illustration by way of the case of *Regina v Makamba* which involved a protest against UDI in 1965 and which is well summarised by B. Goldin in *The Judge, the Prince and the Usuper: From UDI to Zimbabwe* as follows:

the only recorded public act of defiance is contained in *Regina v Makamba* (review case 6126 of 1965). Mr Makamba was convicted under Section 26(2) of the Law and Order Maintenance Act of the offence of "behaving in a manner likely to induce others to refrain from doing something which they were legally entitled to do". The charges against him alleged that on 16 November 1965 he stood outside Tredgold Buildings,

28 For a fuller discussion of the provisions of this Act See W. Ncube "State Security, The Rule of Law and Politics of Repression in Zimbabwe" *Third World Seminar Series*, Oslo, 1990 at p. 4-5.

29 See R. Tredgold, *The Rhodesian That was My Life*, Allen and Unwin, London, 1968.

30 See the Emergency Powers (Maintenance of Law and Order) Regulations, SI 273, 1983.

where the magistrates' courts sat in Bulawayo, holding a placard that read: "No Tax, no rent to rebel government. God bless Nkomo and Africa". In finding that the offence was "thoroughly aggravated both by the accused's actions and in his statement in court", the magistrate said:

It was accused's intention to stir up trouble and he had the effrontery to pick on Tredgold Buildings as a suitable spot to demonstrate his defiance towards the Rhodesian Government. This was a highly scandalous attempt to bring the government of the land into disrepute, and to praise the banned and restricted nationalist leader Nkomo, an enemy of the government and its law-abiding people. Accused's act was sheer defiance of authority. Notwithstanding this, his attitude in court showed no remorse for what he had done. In fact, he aggravated his own case by more acts of defiance and aggression in court. Accused showed complete disregard for the maintenance of law and order and at a time when a state of emergency existed in the country, and five days after the government had declared independence. Accused's behaviour was a serious danger to the safety and security of the country. The court was obliged in terms of Section 59 of the Act to impose a minimum sentence of three years' imprisonment with hard labour on accused and as a severe deterrent to accused and other members of the public who contemplated attacking and defying the government in this manner, the court decided to impose 6 cuts [i.e. 6 strokes with a cane] on accused as well.

The magistrate fulfilled his judicial duty to carry on normally and preserve law and order. The conviction and sentence were according to laws made before UDI and was submitted on review and the corporal punishment was set aside by a judge of the High Court. The imposition of three years' imprisonment was the statutory minimum. This sad and revealing case illustrates the prevailing situation.³¹

That the Rhodesian judiciary believed in the draconian anti-human rights approach of the state is further borne out by the fact that "during the entire UDI period, no decision ever went against the state"³² and also by the fact that judges routinely sent to the gallows hundreds and hundreds of Africans whose only crimes were to fight against institutionalised racism.³³ Thousands more were sent to jail for violating the brutal and repressive laws outlined above. Professor G. Feltoe has summarised the culpability of the Rhodesian judiciary as follow:

The judges took part in the criminalisation process. Their participation started long before UDI. Soon after, however, judges, with only one exception, made it clear that they considered it neither an excuse nor a mitigatory factor that accused had committed and offence because he felt obliged to attempt to overthrow the illegal regime.³⁴

The Rhodesian state was so comfortable with its judiciary that in the 1970s when it created special courts to try political opponents as well as captured guerrillas fighting against the regime it did not use military personnel but appointed ordinary judges assisted by white lay persons to preside over such trials. The legal profession's reaction to the establishment of special courts with summary jurisdiction and the competency to pass the death sentence was one of total silence.³⁵

31 at p. 44-45.

32 John Hatchard, *op cit* note 27 at pp 13.

33 For some of the details of the numbers of persons sent to the gallows see G. Feltoe, *Law, Ideology and Coersion in Southern Rhodesia*, MPhil thesis, University of Kent, 1979, at pp 33-35.

34 at p.89. For a fuller discussion of the role of Rhodesian judges in coersion see Feltoe *Ibid* at pp 78-134.

35 For a fuller discussion of special courts and their contribution to the criminalisation of ordinary politics see G. Feltoe, *Ibid*.

Perhaps the extra-curial comments of some of Rhodesia's judges best illustrate their collaboration in the Rhodesian's state's negation of human rights. Justice Goldin who was Chairman of the Detainees Review Tribunal from 1967 to 1973 is quoted by G. Feltoe³⁶ in his address to the Rotary Club in 1973 as having said that "the country might not have survived without preventive detention" which he believed was necessary. The Detainees Review Tribunal had, throughout Rhodesia, routinely recommended the continued detention of nationalist leaders; persons who had been acquitted by the courts; persons who had been convicted of political offences and were due to be released on completion of their sentences but were then placed in preventive detentions; and ordinary persons who had simply expressed opposition to racism.

Chief Justice MacDonald, often described as the "hanging judge", in an extra-curial political statement to the Rhodesia Promotion Council, in Salisbury in 1975 stated, when referring to the forces of the liberation struggle, *inter alia* that:

I believe that in terrorism we are faced with something so unspeakably evil that there can and must be no thought of compromise with it . . . The choice for all civilised persons in Rhodesia of whatever race has been made for them by the barbaric and inhuman conduct of the terrorists — it is simply that we must overcome this evil and completely eliminate it. The short term advantages of compromising with a movement so steeped in evil could not possibly compensate for the long term disaster which could inevitably result from placing persons resorting to such methods in positions of authority whatsoever.

That fine sounding phrase 'majority rule' — so vague as to be meaningless in constitutional terms — is becoming increasingly recognised for what it is — the subterfuge by which power is seized by an ambitions few — the anti-thesis and not the epitome of democratic rule.³⁷

In summary it is clear that the Rhodesian judiciary and legal profession collaborated in the state's denials and violations of human rights through its enactments which defined large areas of political activity as criminal; placed the onus of proof on the accused;³⁸ imposed harsh minimum sentences; equipped the police with sweeping and draconian powers. All these laws made it difficult for the courts to be used as protectors and defenders of human rights.

Perhaps one can do no better than conclude this part in the words of Professor R. H. F. Austin:

While the jurists in Delhi were progressively expanding the boundaries of the Rule of Law in January 1959, the Federal and Territorial governments here were regressing into the 17th century, indulging in large scale detention of political opponents and generally strengthening the foundations of a repressive system which they continued to build upon into late 1979. The post-occupation paternalism of settler colonial government was turned into a fascist bludgeon which included: The criminalisation of democratic political dissent; the reversal of the presumption of innocence in political or security related crimes; the prescription of mandatory (including death) sentences; the introduction of communal punishment; the growth on a geometric scale, of increasingly arbitrary and summary judicial (and eventually non-judicial) trial procedures; the blanket and advance indemnification by executive fiat of official acts

36 *Ibid* at pp 108-109.

37 Quoted by G. Feltoe *Ibid* at pp 18-25. For an example of MacDonald CJ's judicial political statements see *S v Hove*, 1977(1) SA 518 (RAD) at pp 520-521.

38 For fuller details of some such legislation see Feltoe *Ibid* at pp 78-115.

causing otherwise unlawful injury, death or destruction in the cause of 'security' and the power of virtual perpetual detention without trial of real or imagined political opponents.³⁹

Further on Austin observes that:

The Smith Constitutions emasculated the courts and lawyers of Rhodesia, turning them, in relation to a vital part of the law — that relating to the political and civil rights of the individual — into little more than highly paid, elaborately costumed, occasionally be-wigged YES MEN . . .⁴⁰

In short, the Rhodesia legal profession and judiciary had been either co-opted into the racist anti-human rights system or cowered into acceptance of it.

THE RHODESIAN REPRESSIVE LEGACY AND THE JUDICIARY IN ZIMBABWE

As already seen the Rhodesian state constructed a brutal legal and political order which was strictly enforced by a compliant, if not enthusiastic, judiciary. It was generally believed that the attainment of independence would provide a complete rupture with the Rhodesian repressive laws and politics with the new democratic non-racist government performing the formidable task of creating and developing a democratic constitutional, legal and political order. Indeed, it was the express policy of ZANU (PF) which became the ruling party that upon independence it would repeal all of the Rhodesian repressive laws including the Law and Order (Maintenance) Act, the Unlawful Organisations Act, the Emergency Powers Act, the Vagrancy Act and the Preservation of Constitutional Government Act.

However, once it assumed power ZANU (PF) did not even begin the process of dismantling the repressive colonial legislations. The Rhodesian linchpin of repressive government, the Law and Order (Maintenance) Act has been retained intact and regularly used against political opponents. Recently, the state has sought to repeal and replace the Law and Order Maintenance Act with the Public Order and Security Bill, which is largely a re-enactment of the former. The state of emergency which had been in existence since 1965 was continued until 1990 and the Emergency Powers Act and Regulations made under it were extensively used against thousands of Zimbabweans.

None of the Rhodesian repressive statutes have been repealed. They have remained on the statute books ready for use whenever deemed necessary.⁴¹ Continued into Zimbabwe too was the Rhodesian legacy of political violence, intolerance, intimidation and terror. Such practices are well and fully documented and need no recital here.⁴²

What is of concern is how the courts and the legal profession have responded to the new challenges of the post-independence period within the framework of the staggering

39 R. H. F. Austin, "The Law and The Individual", unpublished paper presented at Newman Hall, Bulawayo, 13 July 1983, at pp 8-9.

40 at p. 10. See also generally C. H. Zimmerli, "Human Rights and The Rule of Law in Southern Rhodesia" *International and Comparative Law Quarterly*, Vol.20, 239.

41 For a fuller discussion see W. Ncube "State Security, the Rule of Law and Politics of Repression in Zimbabwe" *op cit*, note 57.

42 See W. Ncube, *Ibid*, W. Ncube, "Constitutionalism, Democracy and Political Practice in Zimbabwe" in I. Mandaza and L. Sachikonye (Eds), *The One Party State and Democracy: The Zimbabwe Debate*, Sapes, Harare, 1991, at 155-178, W. Ncube, "The Post-Unity Period: Developments, Benefits and Problems" in C.S. Banana (ed) *Turmoil and Tenacity: Zimbabwe 1890-1990*, College Press, Harare, 1989, at 305-335; Africa Watch, *Zimbabwe: A Break With The Past*, Human Rights and Political Unity, London, 1989 and Lawyers Committee for Human Rights, *Zimbabwe: Wages of War: A Report on Human Rights*, New York, 1986.

continuation into Zimbabwe of the Rhodesian anti-human rights statutes. Commenting on the possibilities of the new Constitutional dispensation, the courts and the legal profession providing the catalyst and drive for a break with the past, Professor Austin has observed that:

Nor was the situation helped by another irony. The new state inherited with this body of security law a legal profession which had sadly (with a few exceptions) been either co-opted into the system or been cowed into acceptance of it. A legal profession which had vigorously (even if unsuccessfully) challenged the repressive structure of the white minority state, which had truly asserted its dedication during the colonial era to the traditional Rule of Law would have immediately played a major role in articulating and nurturing the traditional democratic Rule of Law values which the Liberation Movement had insisted on throughout the struggle . . . The essence of these are expressed in the *justiciable* Declaration of Rights in the Constitution of Zimbabwe.⁴³

Further on he observes:

The revolutionary struggle which ended its military phase in December 1979 has not achieved all its objectives by a long way. But one of the important virtues it has brought to the new Zimbabwe is to restore the courts to a role of some importance. It has given them back their voice and their right to judge.

The question then is: Have the courts exercised their right to judge in a manner which has been consistent and jurisprudentially sound and which has advanced the cause of human rights in Zimbabwe? But before we proceed to attempt to answer this question with illustrations it is instructive to note that the justiciable Declaration of Rights in Zimbabwe's Independence Constitution was, like its Rhodesian predecessor, seriously handicapped from the start.

Firstly, the validity of all existing laws inconsistent with the Declaration of Rights was preserved for five years from the date of independence.⁴⁴ Secondly, the substance of the Declaration of Rights itself was largely the same as that contained in the Rhodesian 1961 Constitution with all the elaborate exceptions which came close to annihilating the rights granted. Thirdly, the Constitution permitted the continuation of the State of Emergency by authorising its Declaration by the government with very few, if any, controls.⁴⁵ Fourthly, at the Lancaster House Constitutional Conference the entrenchment and substance of the Declaration of Rights had been largely championed not by the liberation movements which assumed power after independence, but by the 'colonial settler' government delegation represented by the Muzorewa-Smith alliance. The significance of this is that it rendered the legitimacy of the Declaration of Rights in the post-independence period problematic and contentious with the result that it was discredited as a settler/imperialist attempt to disempower the new democratically elected government.⁴⁶ Fifthly, the Rhodesian legal profession was almost entirely white and had no tradition or jurisprudence of human rights litigation. There was thus no significant body of qualified and experienced black lawyers on the ground to champion the enforcement of the Declaration of Rights in the courts.

43 *op cit* at p. 9-10.

44 Section 26(2)(b) and (c). The net effect of this provision was that the whole labyrinth of Rhodesian security legislation became available to the post-independence state for use until 18 April 1985 whereafter it could be constitutionally challenged.

45 Section 68.

46 For a fuller discussion see W. Ncube, "The Constitution as a Liability: Zimbabwe's Experience with a Bill of Rights", *Legal Forum*, Vol.7, Number 1, 1995, at pp 14-20.

Thus reliance had now to be had to the racist white Rhodesian legal profession which had systematically discriminated against black potential lawyers and indeed against those who, notwithstanding the institutionalised discrimination practised against them, had managed to qualify.⁴⁷

THE SUPREME COURT AND ITS APPLICATION OF THE DECLARATION OF RIGHTS⁴⁸

The Constitution of Zimbabwe provides that it is the supreme law of the country and that any law inconsistent with it shall be void to the extent of the inconsistency.⁴⁹ It further gives a direct right to any one alleging a breach of his/her fundamental rights to approach the country's highest court, the Supreme Court.⁵⁰ Furthermore, once approached the Supreme Court has extremely wide and far reaching powers to remedy the breach if proved. It may make whatever order, issue whatever writ or give whatever directions the court considers appropriate to enforce or seek to enforce the Declaration of Rights provisions.⁵¹ In practice, the Supreme Court has readily asserted this power and has insisted that under these provisions it has a wide and unfettered discretion to remedy any proven breach of fundamental rights.⁵²

It has further adopted the approach that it will construe fundamental rights provisions liberally and not restrictively⁵³ while derogations from fundamental rights will be strictly and narrowly construed.⁵⁴

The Supreme Court has received worldwide accolades for its performance in the enforcement and interpretation of the Declaration of Rights. The former Chief Justice, Enoch Dumbutshena, was awarded an honorary doctorate in Civil Laws by the University of Oxford in recognition of the role played by the Supreme Court in the protection of human rights in Zimbabwe. We summarise below some of the Supreme Court's major decisions in interpreting the Declaration of Rights which have earned it the good reputation it now has.

Operating within the framework of a state of emergency which was in force until 25 July 1990 — more than 10 years after independence — the courts upheld the rights of detained persons to unrestricted private access to their lawyers and held unconstitutional emergency powers provisions which sought to deny or restrict this right.⁵⁵ Also held inviolable was the right of detained persons to have their cases submitted timeously by the state for review by a Detainees Review Tribunal, otherwise failure to do so rendered the continued detention

47 For a fuller discussion of this aspect see W. Ncube, "Legal Education and Access to the Legal Profession in Zimbabwe", unpublished, G. Moyo, *op cit*, note 5.

48 Much of what appears under this sub-heading comes from my paper W. Ncube, "The Constitution as a Liability: Zimbabwe's Experience with a Bill of Rights" *Legal Forum* Vol. 7 No. 1 1995 p14 at p20.

49 Section 89.

50 Section 24(1).

51 Section 24(4).

52 See *In re Mlambo* 1991(2) ZLR 339(S) and *CCJP v A-G & Others* 1993(1) ZLR 242(S) at 283.

53 See *Hewlett v Minister of Finance & Others* 1982 (1) SA 490 and *Rattigan & Others v The Chief Immigration Officer and Others* 1994 (2) ZLR 54.

54 *In re Munhumeso & Others* 1994 (1) ZLR 49 (S).

55 See *Dabengwa and Masuku v Minister of Home Affairs & Others* 1982 (4) SA 301 and *Paweni v Minister of State Security* HH-180-84.

unlawful.⁵⁶ The courts also insisted that they had the power and authority to review all ministerial powers in respect of detentions even where regulations granting such powers were framed in subjective terms.⁵⁷ The use of detention powers for illegitimate or improper purposes unconnected with protection of state security was held to be unconstitutional.⁵⁸

The rights of detained persons to be informed of the reasons for their detention so that they could make meaningful representations before the Detainees Review Tribunal were upheld. In *Minister of Home Affairs & Another v Austin Another supra* the Supreme Court held that this right meant that the detainee was entitled to be provided with the detailed material particulars which constitute the foundation of his detention. Bald, vague and imprecise allegations would not suffice.⁵⁹ The courts have also not hesitated awarding damages to those persons whose fundamental rights have been violated⁶⁰ even though the state has not always complied with orders for the payment of damages.⁶¹

The liberal interpretation of human rights provisions relating to the right to personal liberty by the courts has not been uniform. In a number of instances, the courts have chosen soft interpretations which have had the unfortunate result of rendering nugatory the constitutional protection of the right to liberty. In *York v Minister of Home Affairs*⁶² the High Court, after the executive had repeatedly refused to comply with orders for the release of the York brothers who were being unlawfully detained and after a public confrontation between the two arms of the state, chose a soft and clearly wrong interpretation of human rights provisions which permitted the state to continue the detention of the York brothers under the guise that they were held under investigative detention as opposed to preventive detention and hence were not entitled to rights guaranteed by the Constitution since such rights applied to those held in preventive detention.⁶³ Elsewhere I have described this decision as representing "the capitulation of the judiciary in the face of the executive's unwillingness to be bound by the law"⁶⁴ Fortunately, other judges have refused to follow the approach adopted in the *York* case on the basis that all forms of detention without trial fall within the protective provisions of the Constitution.⁶⁵

Again in *Minister of Home Affairs v Dabengwa*⁶⁶ the Supreme Court chose a soft interpretation of the constitution in order to avoid declaring the continued detention of Dabengwa to be unlawful. Relying on outmoded, irrelevant and misunderstood foreign judgments and

56 See *York v Minister of Home Affairs & Another* HH-218-82 and *Minister of Home Affairs v York* 1982 (2) ZLR 48 (S).

57 See *Haruperi & Others v Minister of Home Affairs & Another* HH-278-83 at p. 11, *Minister of Home Affairs v Austin & Another* S-79-86.

58 See also *Paweni v Minister of State (Security) supra* at p.11.

59 See also the *Paweni* case *supra*.

60 See for example, *Granger v Minister of State* 1984 (2) ZLR 102 (S); *Minister of Home Affairs v Allan* S-76-86, *Mukomberedzi v Minister of State (Security)*; *Banda v Minister of Home Affairs & Others* HH-243-87. See also G. Feltoe and P. Lewin, "Remedies for Unlawful Interference with Personal Liberty in Zimbabwe" ZL Rev. 1987, Vol 5, 26.

61 See G. Feltoe and P. Lewin *Ibid* at pp51-53.

62 HH-264-82.

63 For a detailed discussion of this decision see Ncube, "Investigative Detention Distinguished from Preventive Detention: A Distinction Without a Difference?" ZL Rev, 1987, Vol 5, 247.

64 *Ibid*, at p. 250.

65 See *Bull v Minister of State* HH-308-86.

66 1984(2) SA 345 (S).

ignoring recent and powerful judgments to the contrary the Supreme Court held that the violation of a mandatory constitutional safeguard relating to continued detention subsequent to the making of a valid order *ab initio* did not render continued detention unlawful and hence must be remedied by way of a *mandamus* directed at ensuring compliance with the constitutional safeguard. This judgment has been trenchantly criticised as "an unfortunate aberration representing judicial surrender or mollification in the face of the Executives' unpreparedness to put itself within the bounds of enshrined constitutional safeguards".⁶⁷

Outside the protection of individual liberty the courts have sought to limit and control the exercise of arbitrary power against perceived "enemies" of the government such as students.⁶⁸ The imposition of a sentence of judicial whipping on both adults and juveniles was held unconstitutional on the basis that such punishment is inherently inhuman and degrading and hence violates section 15 of the Constitution.⁶⁹ The solitary confinement of prisoners has also been held to be unconstitutional.⁷⁰ The judiciary has been most firm in upholding the rights of owners of private property which are so laboriously protected under the Lancaster House Constitution.⁷¹

Confessions obtained through torture or some other form of physical or psychological ill-treatment have been held to be illegal and inadmissible as evidence.⁷² The right to a speedy and fair trial has been repeatedly upheld with the Supreme Court holding that where the state has unduly delayed bringing an accused person to trial the court will not hesitate to order a permanent stay of the proceedings.⁷³ It has held that restrictions imposed upon the freedom of expression and assembly by section 6 of the Law and Order (Maintenance) Act are unconstitutional as they go beyond what is reasonably required in a democratic society.⁷⁴ Prolonged delay in carrying out a sentence of death in circumstances where the prisoner is held in adverse and severe prison conditions has also been held to be unconstitutional in that it is inhuman and degrading treatment in violation of the prohibition against inhuman and degrading punishment or treatment.⁷⁵ It has been held that prisoners do not lose their fundamental rights by virtue of their imprisonment and hence a failure to allow a prisoner on death row, adequate time outside his prison cell for the purpose of exercising has been held to violate the Constitution.⁷⁶ Similarly, a prison regulation allowing prisoners to write and receive only one letter every four weeks has been held to violate the Constitutional protection of the freedom of expression.⁷⁷ The freedom of expression has been most firmly

67 See W. Ncube, "When is a Breach of the Constitution Not Unlawful?", *ZL Rev*, 1987, Vol.5, 202, See also J. Hatchard "Breach of Constitutional Safeguards in Preventive Detention Cases", *ZL Rev*, 1985, Vol. 3, 114.

68 See, for example, *A Mutambara & Others v Minister of Home Affairs* HH-231-89.

69 See *S v Ncube & Others* 1987 (2) ZLR 246 (S) and *S v A Juvenile* 1989 (2) ZLR 61 (S).

70 *S v Masitere* 1990 (2) ZLR 105 (S).

71 See *Hewlett v Minister of Finance & Another* 1982 (1) SA 490; *Minister of Home Affairs v Bickle* 1984 (2) SA 439 and *Rensford v The Commissioner of Police* S-30-84. See also S.B.O. Gutto and K. Makamure "Judicial Subversion Under the Cloak of Legality?" *ZL Rev* 1985 Vol. 3, 119.

72 *S v Slatter & Others* 1983 (2) ZLR 144 (H).

73 *Fikilini v A-G* 1990(1) ZLR 105 (S); *In re Mlambo supra*; *S v Dube & Another* 1989(3) ZLR 245(S) and *S v Corbett* 1990(1) ZLR 205 (S).

74 *Munumheso & Others v A-G supra*.

75 *CCYP v A-G* 1993(1) ZLR 242 (S).

76 *Conjwayo v Minister of Justice & Another* 1991(1) ZLR 105.

77 *Woods & Others v Minister of Justice, Legal and Parliamentary Affairs* 1995 (1) SA 703.

upheld in *Retrofit (Pvt) Ltd v The PTC & Another*⁷⁸ wherein a provision of a statute granting the state-controlled Posts and Telecommunications Corporation (PTC) a monopoly over cellular telephonic communication business was found to violate the constitutional right to freedom of expression.

Freedom of conscience was upheld in *In Re: Enock Munyaradzi Chikweche*⁷⁹ where the right of a qualified lawyer to be registered as a legal practitioner while displaying his Rastafarian beliefs by wearing dreadlocks was held to be constitutionally protected under the freedom of conscience. In *Rattigan and Others v The Chief Immigration Officer and Others*,⁸⁰ while upholding the right of Zimbabwean women to reside in Zimbabwe with their foreign spouses, the Supreme Court employed a "process" of reasoning which has been rightly criticised as being so "unintelligible" as to be capable of being described as "magical".⁸¹ In a subsequent case based on essentially the same arguments and principles the court decided that a foreign woman formerly married to a Zimbabwean man and with whom she had children had no right to remain in Zimbabwe to be with her children and hence her right to freedom of movement was not violated by an executive order expelling her from Zimbabwe even if such expulsion meant she had to leave her children behind.⁸²

The right against self incrimination has been restrictively interpreted as excluding the pre-trial stage. Hence a person who is under investigation by the police can be compelled to give the police the information about his affairs which they may require for their investigations.⁸³

However, the most retrogressive and disturbing judgment to come out of the Supreme Court has to be *Chairman, Public Service Commission and Others v Zimbabwe Teachers Association and Others*⁸⁴ which can be properly described as amounting to the retreat of the judicial review of executive action.

In concluding this section it can be said that the approach of the Supreme Court to the Constitutional interpretation of fundamental rights has been somewhat inconsistent and has sometimes lacked jurisprudential and philosophical logic. However, these inconsistencies and jurisprudential weaknesses apart it is true that, by and large, Zimbabwe's judiciary, notwithstanding all the baggage inherited from Rhodesia, has played an important role in the development and enforcement of human rights. It has, more often than not, upheld the constitutional rights of citizens against encroachment by the executive. It has sought to play a pivotal role in limiting the arbitrary use of power by insisting that the exercise of such powers are subject to judicial review and should always be exercised reasonably and in accordance with the law.⁸⁵

78 1995 (2) ZLR 199, see also *Retrofit (Pvt) Ltd and Ministry of Information* 1995 (2) ZLR 422.

79 1995 (1) ZLR 235 (S).

80 1994 (2) ZLR 54.

81 See L. Madhuku, "Magic and Constitutional Interpretation: Casenote on *Rattigan and Others v The Chief Immigration Officer and Others*", *Legal Forum* Vol.6 No.3 1994 9.

82 *Ruwodo v Minister of Home Affairs and Others* 1995 (1) ZLR 227.

83 See *Poli v Minister of Finance, Economic Planning and Development* 1987(2) ZLR 302(S) and also *S v Mazorodze* 1989(1) ZLR 218 (S).

84 1996 (1) ZLR 637 (SC).

85 See generally J. Hatchard, "The Constitution of Zimbabwe: Towards a Model for Africa" *JAL* 1991 Vol. 35, Nos 1 and 2, 79-101.

CONCLUSION

Within the context of the historical difficulties occasioned by the Rhodesian legal system, Zimbabwean courts have performed reasonably well in advancing human rights even within the somewhat constrained circumstances of our constitutional and legal order characterised by strictly defined fundamental rights subject to elaborate exceptions. Another difficulty and constraining factor has been the unwillingness of the executive to operate within the bounds of law and to accept the rulings of the courts as final. It must be difficult for judges to see their judgements on constitutional interpretation being repeatedly reversed by constitutional amendments designed to limit the extent of human rights as defined by the courts. However, one has to accept that, as observed earlier, the constitution is only as good as the people who make it and live under it. Ultimately, the courts can only do so much in protecting fundamental rights. The rest has to be left to the people who must insist, in the republican fashion, that their rights and freedoms be respected. Interestingly, in *Chairman, Public Service Commission and Others v Zimbabwe Teachers Association (supra)* the Supreme Court suggested as much when it remarked that:

The electorate puts its confidence in the decisions of the government and it is for the electorate to decide, when the time comes for voting, whether or not it wishes to continue to repose that confidence in the ruling party.⁸⁶

What this simply means is that the courts cannot be the sole defenders of human rights. Indeed, they cannot even be the main defenders. In the final analysis the words of Judge Learned Hand ring out loud and clear:

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, they are false hopes. Liberty lies in the hearts of men and women; when it dies there is no constitution, no law, no court [which] can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.⁸⁷

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⁸⁶ at 645 E.

⁸⁷ Quoted from Learned Hand J in "Spirit of Liberty; Papers and Addresses of Learned Hand" 1953 by M. Kirby in "The Role of The Judge in Advancing Human Rights by Reference to International Norms", *Developing Human Rights Jurisprudence*, Commonwealth Secretariat, 1988 at p 84.

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